87-108

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARVEY FURGATCH,
Petitioner,
v.
FEDERAL ELECTION COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the key phrase "expressly advocating", as employed in the Federal Election Campaign Act, is satisfied by a finding of "clear" or "unambiguous advocacy"—a holding that is directly contrary to *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

2. Whether the Federal Election Campaign Act, as applied below, violates the First Amendment's requirement that any regulation of core political speech be narrow and specific.

3. Whether the Federal Election Campaign Act's regulation of "independent expenditures" violates the equal protection component of the Fifth Amendment because it discriminates against the general public by exempting the institutional press for no discernible reason.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. The Court of Appeals' test for the statutory phrase "expressly advocating" is identical to that rejected by this Court in *Buckley* v. *Valeo* as being unconstitutionally vague	9
II. The decision of the Court of Appeals is contrary to basic principles of First Amendment law which underpin the decision of this Court in *Buckley* v. *Valeo*	12
III. The Court of Appeals has chilled the public's right of free speech by adopting a "substantive" approach that permits the FEC to attach implied and ungrammatical meanings to challenged publications, in conflict with a decision of the Second Circuit	15
IV. The history of this litigation demonstrates that the "express advocacy" language of the Act is too imprecise to satisfy the requirements of the First Amendment	19
V. The Act's exemption for newspapers and other media discriminates against ordinary citizens, in violation of the Fifth Amendment	21
CONCLUSION	24

TABLE OF AUTHORITIES

CASES: Page

Arkansas Writers' Project, Inc. v. *Ragland*, 55 U.S. Law Week 4522 (April 22, 1987) 22
Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*
Buckley v. *Valeo*, 519 F.2d 821 (D.C. Cir. 1975) 10
California Medical Assn. v. *Federal Election Commission*, 453 U.S. 182 (1981) 5, 22
Carey v. *Brown*, 447 U.S. 455 (1980) 22
Federal Election Commission v. *American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979) 16
Federal Election Commission v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*en banc*) 15-19
Federal Election Commission v. *Massachusetts Citizens for Life, Inc.*, 107 S. Ct. 616 (1986) 14, 17, 18
Furgatch v. *Federal Election Commission*, CA No. 87-7180 (9th Cir. filed April 22, 1987) 5
Lovell v. *City of Griffin*, 303 U.S. 444 (1938) 23
Mills v. *Alabama*, 384 U.S. 214 (1966) 14, 22-23
NAACP v. *Button*, 371 U.S. 415 (1963) 13
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 14, 15
Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972) 22
Thomas v. *Collins*, 323 U.S. 516 (1945) 12, 13
United States v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) 15

CONSTITUTION, STATUTES, REGULATION AND RULE:

United States Constitution, First Amendment ..... *passim*
United States Constitution, Fifth Amendment ..... *passim*
Federal Election Campaign Act
2 U.S.C. 431 *et seq.* ..... *passim*
§ 431(9) 2, 4, 21
§ 431(17) 2, 3
§ 434(c) 2, 3, 13
§ 437(h) 5

TABLE OF AUTHORITIES—Continued

	Page
§ 437c(b)(1)	2
§ 437g(a)(6)	2
§ 441d	2
§ 608(e)(1)	23
28 U.S.C. 1254(1)	2
11 C.F.R. 109.1(b)(2)	16
Fed. R. Civ. P. 12(b)6	4
MISCELLANEOUS:	
Black's Law Dictionary (5th ed. 1979)	11
Clagett and Bolton, *Buckley* v. *Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 Vanderbilt L. Rev. 1327 (1976)	20
H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 4 (1974)	22
H.R. Rep. No. 1057, 94th Cong., 2d Sess. (1976)	9
The Washintgon Post	15
Webster's Third New International Dictionary (1976)	11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Harvey Furgatch, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above cause on January 9, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 807 F.2d 857, and is reprinted in Petitioner's Appendix ("Pet. App.") at 1a-17a.

The memorandum decision of the United States District Court for the Southern District of California (Thompson, C.J.) has not been reported. It is reprinted at Pet. App. 19a-21a.

JURISDICTION

Respondent, Federal Election Commission ("FEC"), brought this suit in the United States District Court for the Southern District of California pursuant to 2 U.S.C. 437c(b)(1) and 437g(a)(6). On November 21, 1983 petitioner's motion for dismissal for failure to state a claim was granted orally, and a memorandum opinion (Pet. App. 19a-21a) was issued on November 23, 1984.

On respondent's appeal, the Ninth Circuit on January 9, 1987, entered a judgment and order reversing the District Court's order. Pet. App. 1a-17a. Petition for rehearing and suggestion for rehearing *en banc* were timely filed on January 22, 1987. The Ninth Circuit denied the petition and rejected the suggestion on April 23, 1987. *Id.* at 18a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of 2 U.S.C. 431(17), 434(c)(1), 437g(a)(6) and 441d are reproduced in the opinion of the Court of Appeals (Pet. App. 3a-5a nn. 1-3).

Section 431(9)(B) of 2 U.S.C. provides in relevant part:

> (B) The term "expenditure" does not include—
> (i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate; * * *

STATEMENT OF THE CASE

This is an action for injunction and approximately $25,000 in civil penalties instituted against petitioner Harvey Furgatch by the Federal Election Commission

("FEC") on March 25, 1983, under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq* ("the Act" or "the Campaign Act"). Under the Act and the regulations of the FEC, a person making "independent expenditures" amounting to $250 or more must place a statement in the advertisement revealing the name and address of the person paying for the advertisement, and the advertisement must state whether it is authorized by any candidate. 2 U.S.C. 434(c). He must also report the expenditure to the FEC. *Ibid.* Advertisements constitute "independent expenditures" only if they are "expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. 431(17).

The FEC alleges that petitioner made "independent expenditures" subject to the Act when he paid for a full-page advertisement published in the *New York Times* on October 28, 1980 and again in the *Boston Globe* on November 1, 1980. Both advertisements said they were paid for by Harvey Furgatch, and gave his mailing address. The advertisements were not authorized by a candidate. Petitioner's alleged violations are that (1) the *Boston Globe* advertisement did not say "Not authorized by any candidate," and (2) petitioner did not file a statement of his expenditures with the FEC.

The controversy centers upon whether the advertisement expressly advocated President Carter's defeat. The only words in the advertisement which ask the reader to take any action are "Don't let him do it." [1] The parties, the District Court and the Court of Appeals all agree that the advertisement does not expressly say what action the reader should take in order to "Don't let him do it." The litigants and the two courts below have, however, differed as to how the advertisement should be interpreted, and are in conflict as to what kind of reading is permitted by the statutory phrase "expressly advocat-

[1] A reproduction of the New York Times advertisement appears at Pet. App. 22a.

ing," and by the First Amendment's requirement of narrow specificity.

Petitioner moved for dismissal of the complaint under Fed. R. Civ. P. 12(b)6 for failure to state a claim, on the grounds *inter alia,* (1) that the advertisement did not "expressly" advocate the election or defeat of a candidate within the meaning of the Act; (2) that on its face, and as applied by the FEC, the Act is an unconstitutionally vague and overbroad regulation of core political speech; and (3) that the Act deprives petitioner of equal protection insofar as § 431(9)(B)(i) exempts editorials of "any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate," from the requirements imposed on ordinary citizens such as Mr. Furgatch.

The District Court dismissed the compaint. The key questions as posed by the District Court were "whether the phrase 'Don't let him do it' is the equivalent of the expression 'vote against Carter' " and "Does the ad ask the reader to vote against the President?" Pet. App. 20a. The District Court decided that the advertisement "will [not] bear such a reading," and that "the range of actions expressly recommended by the ad obviously did not include voting the President out of office." *Id.* at 20a-21a. Having decided that the statute was not applicable to the petitioner's expenditures for the advertisement, the District Court did not consider the constitutional issues raised by petitioner. *Id.* at 21a.

The FEC appealed, contending that "when read as a whole, it is clear that the ads explicitly exhort the reader to stop Carter from 'succeed[ing] in burden[ing]' the country with 'four more years' of his assertedly harmful leadership."[2] However, on the same page of its brief, the

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[2] Brief for Appellant FEC in *FEC* v. *Furgatch,* No. 85-5524 ("FEC Br.") at 8-9. The FEC also argued that the ad was an

FEC read the advertisement differently, not as an exhortation to prevent the candidate from succeeding at the polls, but instead as an exhortation not to let him succeed in hiding his record.[3]

Petitioner's response was that the correct grammatical and rhetorical reading of the ad is that it asks readers to stop Carter from hiding his record, and that the FEC's argument was based entirely on inference. Petitioner also argued that the statute is violative of the Fifth Amendment, in that it regulates the speech of private citizens while exempting the editorials of the commercial press, a distinction which has no conceivable rational basis.[4]

"explicit call to stop Carter from succeeding in the election" (*id.* at 9 n.3), and an "explicit call to stop Carter from succeeding in obtaining 'four more years.'" *Id.* at 10 n.5.

[3] Thus, the FEC said (FEC Br. at 8), "* * * [the advertisements] went on to assert that Carter's campaign was 'an attempt to hide his own record, or lack of it,' and warned that if Carter 'succeeds' *in this objective* 'the country will be burdened with four more years of incoherencies, ineptness and illusion. * * *'" (Emphasis supplied.)

[4] When the FEC appealed this case, petitioner attempted to secure certification of the constitutional issues to the *en banc* Court of Appeals, and the concomitant right of appeal to the Supreme Court, by filing a declaratory judgment action pursuant to 2 U.S.C. 437(h). This course was authorized by *California Medical Assn.* v. *Federal Election Commission*, 453 U.S. 182 (1981). The FEC moved for dismissal on the ground that the 437(h) case was then moot, because petitioner had prevailed in this enforcement action. District Judge Nielsen dismissed the declaratory judgment action, but on appeal the Court of Appeals remanded the declaratory judgment action for further consideration, because it had reinstated the enforcement action. Judge Nielsen then refused to certify the constitutional issues, and petitioner thereupon filed a mandamus petition with the *en banc* Court of Appeals, in order to preserve its right to *en banc* review with the subsequent right of appeal to this Court. At the present time the petition is still pending. *Furgatch* v. *FEC*, CA No. 87-7180 (9th Cir. filed April 22, 1987).

Noting that this was its first occasion to consider the scope of the Act, the Court of Appeals found (Pet. App. 9a) that "[n]either [the] decisions [of the First or Second Circuits] nor counsel for the parties have supplied us with an analysis of the standard to be used or even a thoughtful list of the factors which we might consider in evaluating an 'express advocacy' dispute."

Turning to the case at hand, the court announced (*id.*):

> As this litigation demonstrates, the "express advocacy" language of *Buckley* and [the Act] does not draw a bright and unambiguous line. We are called upon to interpret and refine that standard here.

The Court of Appeals summed up the task before it, as follows (*id.* at 11a):

> Although we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act. * * * This concern leads us to fashion a more comprehensive approach to the delimitation of "express advocacy," and to reject some of the overly constrictive rules of interpretation that the parties urge for our adoption.

The test adopted by the Court of Appeals for "express advocacy" (*id.* at 14a) is that "it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." This test (*id.*) is comprised of three main components:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present

> purposes if its message is ummistakable [sic] and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action. * * * Finally, it must be clear what action is advocated. * * *

Applying this test, the Court of Appeals (*id.* at 15a) disagreed with the District Court's reading of the advertisement and reversed the dismissal (*id.* at 17a).

The opinion of the Court of Appeals concludes (*id.*) with the declaration that:

> We do not address Furgatch's constitutional claims except to note that the constitutionality of the provisions at issue was reviewed in *Buckley*, and the standard set forth by the Supreme Court in that case was incorporated in the Act in its present form. Treatment of those constitutional issues is implicit in our disposition of the statutory question.

Nowhere in its opinion does the Court of Appeals address the Fifth Amendment argument raised by petitioner and briefed by the parties.

On petition for rehearing, petitioner objected *inter alia* to the court's failure to attend to the dictionary distinction between "express" and "implied" advocacy.[5]

The FEC responded that it is an "extreme argument" to contend that "the 'express advocacy' standard must be applied in a strictly grammatical manner." Opposition of FEC to Petition for Rehearing and Suggestion for Rehearing En Banc in *FEC* v. *Furgatch*, No. 85-5524 ("FEC Opp.") at 5. The FEC argued that it is proper for the court "to consider * * * facts that are outside the four corners of the advertisement, or to recognize ideas that are communicated by unambiguous reference rather than by explicit words." *Ibid.*

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[5] See n.11, *infra*.

The FEC contended that "the Supreme Court's own application of the express advocacy standard * * * is based upon a substantive rather than a grammatical approach" (*id.* at 5), and that "the examples of express advocacy listed in *Buckley* made clear that the strict grammatical approach was incorrect" (*id.* at 7).

Petition for rehearing was denied, and suggestion for rehearing *en banc* was rejected, by the Court of Appeals on April 23, 1987.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals grants power to the Federal Election Commission to chill the political speech of individual citizens during the approaching election season, in disregard of *Buckley* v. *Valeo*, 424 U.S. 1 (1976). It directly presents serious questions as to the construction and constitutionality of the "independent expenditures" section of the Campaign Act.

The decision below has erased the line which this Court drew in *Buckley* between (1) the advocacy of an election result, which may constitutionally be subjected to minimal regulation, and (2) the discussion of candidates and issues, which under the First Amendment must be free of any regulation. This Court sought to save the prior Campaign Act from unconstitutional vagueness by introducing the concept of "express advocacy," which Congress later incorporated into the Act. The whole point was to assure narrow specificity, as required by the First Amendment. The Court of Appeals has now substituted words that invite confusion and debate, such as "no other reasonable interpretation," "clearly" and "unambiguously." The proposed standard would reinstate the very test which this Court rejected in *Buckley* on the ground that it lacked the precision required by the First Amendment.

The decision below disregards the principles enunciated in *Buckley*; it adopts an approach that is in sharp contrast with a decision of the Second Circuit Court of Appeals; and it enables the Federal Election Commission to advance a new "substantive" approach that disdains grammar as the proper means of determining what is expressly advocated. Mr. Furgatch's experience demonstrates that, as applied, the Campaign Act's regulation of "independent expenditures" is unconstitutionally vague.

Review by this Court is also appropriate to consider a substantial Fifth Amendment question raised by petitioner but inexplicably ignored by the Court of Appeals: whether the Act's exemption of the institutional press from the reporting and disclaimer obligations imposed on individual citizens by the Act is a discrimination lacking any rational basis.

I. The Court of Appeals' test for the statutory phrase "expressly advocating" is identical to that rejected by this Court in *Buckley* v. *Valeo* as being unconstitutionally vague.

If the Campaign Act means what the Court of Appeals says it means, then it is unconstitutionally vague under this Court's decision in *Buckley* v. *Valeo*.

The version of the Campaign Act reviewed by the Court in *Buckley* did not contain the words "expressly advocating." This Court adopted the phrase, later incorporated into the Act by Congress, as the necessary means to make the statute sufficiently narrow and specific to pass Constitutional muster.[6] In *Buckley*, the Court of Appeals for the D.C. Circuit had limited the coverage of the statute to "clear" advocacy, but this Court unanimously rejected that standard. This Court held that requiring "clear" advocacy "refocuses the vagueness

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[6] *See* H.R. Rep. No. 1057, 94th Cong., 2d Sess. 38 (1976).

question, [but] the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether." 424 U.S. at 42. The standard rejected in *Buckley* is virtually identical with the test adopted by the Court of Appeals below:

The Rejected *Buckley* Proposal [7]	The Test of the Court Below [8]
"The test, then, is whether the expenditure (or the publicity which it buys)	"to be express advocacy . . . it must,
taken as a whole	when read as a whole, and with limited reference to external events,[9]
amounts to a clear advocacy	be susceptible of no other reasonable interpretation but as an exhortation
of the election or defeat of a clearly identified candidate."	to vote for or against a specific candidate."

There is no meaningful difference between "clear" advocacy (the test rejected in *Buckley*), and advocacy which is "susceptible of no other reasonable interpretation." The identity of the two tests is emphasized by the Court of Appeals' ensuing recital (Pet. App. 14a) of the "three main components" of its test, which are merely three repetitions of "clearly":

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present pur-

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[7] *Buckley* v. *Valeo*, 519 F.2d 821, 853 (D.C. Cir. 1975). The Court of Appeals in *Buckley* also emphasized "in addition to a clear and unambiguous reference, the expenditure must clearly be 'advocating the election or defeat of such candidate.'" *Id.*

[8] Pet. App. 14a.

[9] The test of the court below is even more vague insofar as it permits "limited reference to external events". What constitutes "limited reference" is anybody's guess, and to employ "external events" is contrary to the essence of "expressly".

> poses if its message is *ummistakable* [sic] and *unambiguous*, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a *clear* plea for action * * *. Finally, it must be *clear* what action is advocated. (Emphasis supplied).[10]

The Court of Appeals recognized no distinction between "clearly" and "expressly". It declared (Pet. App. 16a) that "failure to state with specificity the action required does not remove political speech from the coverage of the Campaign Act when it is clearly the kind of advocacy * * * that Congress intended to regulate." [11]

Buckley commanded the very specificity rejected as unnecessary by the Court of Appeals. In *Buckley* this Court repeatedly emphasized the need for "explicit words", "express words", or "express terms" "expressly advocating" an election result. *See* 424 U.S. at 43, 44 n.52 and 80 n.108. The Court gave examples of what

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[10] The identity with the test that was rejected in *Buckley* is further emphasized in its application here. The court below says, "Although the ad may be evasively written, its meaning is clear." Pet. App. 16a. And again, "[t]here is vagueness in Furgatch's message, but no ambiguity." *Id.* at 17a.

[11] Dictionaries make clear that while "express" requires clarity, it adds another important element: the clarity must be explicit, in contrast to meanings which may be derived from inference, or which are implicit.

Thus, Webster's Third New International Dictionary 803 (1976) says that "express" means "directly and distinctly stated or expressed rather than implied or left to inference." Black's Law Dictionary 521 (5th ed. 1979) says "[t]he word is usually contrasted with 'implied' ", and defines "implied" as follows (*id.* at 679):

> This word is used in law in contrast to "express"; i.e., where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties.

it meant: "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. Petitioner has never contended that those phrases exhaust the catalogue of explicit words, nor that the express advocacy must be in one sentence, or on one page—but he contends that there is a distinction between "clear" and "express" which the court below ignores.

The failure of the Court of Appeals to faithfully apply this Court's decision in *Buckley* warrants review and reversal. The issues involved in this dispute over the standard to be applied to an individual's newspaper advertisement go to the heart of the First Amendment's requirement that limitations on speech be narrow and specific.

II. The decision of the Court of Appeals is contrary to basic principles of First Amendment law which underpin the decision of this Court in *Buckley* v. *Valeo*.

The test for "expressly advocating" which the Court of Appeals adopted is rooted in an approach that conflicts with principles of First Amendment law relied upon in *Buckley*.

A.

In *Buckley* this Court reconfirmed that both "intent" and "effect" are impermissibly vague inquiries to pursue in identifying which kinds of speech may be regulated. 424 U.S. at 43. Quoting from *Thomas* v. *Collins*, 323 U.S. 516 (1945), the Court said that the search for a speaker's intention or the audience's understanding would leave a speaker "at the mercy of the varied understanding of his hearers", and thus would leave inadequate "breathing space" for the exercise of First Amendment rights. 424 U.S. at 43.[12] Yet the Court of Appeals (Pet. App. 13a)

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[12] The emphasis of the court below on the fact that the publications appeared close to election day confirms this danger. Under

speculated freely about intention, and about the effect of the advertisement upon the audience (*id.* at 15a-17a). The Court of Appeals seemed to acknowledge (*id.* at 13a) its departure from *Thomas* v. *Collins* (and thus *Buckley*) with a "*But see*" citation.

Indeed, "intent" appears to be the controlling and guiding factor in the opinion of the Court of Appeals (*id.* at 11a): "We must read section 434(c) so as to prevent speech that is clearly intended to effect [sic] the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act." This preoccupation is in sharp contrast with the warning of this Court in *Buckley* that "vague laws may * * * 'trap the innocent by not providing fair warning' ". 424 U.S. at 41 n.48. Instead of providing "breathing space" for the citizen's right of political speech, the court below would deny him the option to follow the deliberate line provided by the Act. Accordingly, the court's approach is in clear opposition to a fundamental premise of *Buckley*.

B.

A principal basis of the *Buckley* opinion is the long-established rule that the regulation of speech can be tolerated only when the command of the regulatory statute is limited within narrow and specific boundaries, and most strictly so when the target is core political speech. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 40-41 and 77; and *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). The Court of Appeals has inexplicably carved out an unwarranted exception to this rule. According to the Court of Appeals (Pet. App. 10a-11a), because the Act is an effort to require the distribution to the public of information that will aid in the exercise of voting rights,

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the Court of Appeals' test, a member of the public has no means of knowing the proper date when an advertisement of this type can safely be published. And, as election day draws near, the importance of protecting core political debate increases.

and to this extent furthers the purposes of the First Amendment, the Act need be no more specific than is necessary to the performance of its own informational purposes. Accordingly, the Court of Appeals concluded (*id.* at 11a) that "[a]lthough we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act." The approach of the Court of Appeals is in sharp contrast with the recognition of this Court in *Buckley* that under the deliberately narrow phrase "expressly advocating", persons "are free to spend as much as they want to promote the candidate" so long as they "eschew expenditures that in express terms advocate * * * election or defeat * * * ." 424 U.S. at 45.

C.

"*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues *and candidates* from more pointed exhortations to vote for particular persons." *Federal Election Commission* v. *Massachusetts Citizens for Life*, 107 S. Ct. 616, 623 (1986) (emphasis supplied) ("MCFL"). Other decisions of the Court have emphasized the equal importance of discussion of issues and discussion of candidates. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). As the Court in *Buckley* noted, "[d]iscussion of issues *and debate on the qualifications of candidates* are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression * * *." 424 U.S. at 14 (emphasis supplied).[13]

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[13] The character, abilities and campaign tactics of politicians often become public issues without regard to specific election results. See *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 273

The Court of Appeals' opinion accords a lesser constitutional protection for speech that focuses on the qualifications of an incumbent candidate. Applying a novel limitation on core political speech, the court emphasized (Pet. App. 17a) that "the ad directly attacks a candidate, not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign. It is the type of advertising that the Act was enacted to cover." The court thus ignores this Court's observations in *Buckley* that "campaigns themselves often generate issues of public interest" (424 U.S. at 42), and that persons "are free to promote the candidate and his views" so long as they "eschew expenditures that in express terms advocate * * * election or defeat * * *." *Id.* at 45. The Court of Appeals failed to recognize that the way campaigns are run is a public issue, and the legitimate object of political debate.

III. The Court of Appeals has chilled the public's right of free speech by adopting a "substantive" approach that permits the FEC to attach implied and ungrammatical meanings to challenged publications, in conflict with a decision of the Second Circuit.

The decision of the Court of Appeals authorizes the FEC to exercise regulatory control over speech that constitutes implied advocacy of a particular election result, in conflict with the decision of the Second Circuit in *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*en banc*) ("*CLITRIM*"). The FEC calls this new construction of the Act the "substantive approach", and

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n.14; and *United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1139-1142 (2d Cir. 1972). Six weeks before the 1980 election, a *Washington Post* editorial attacked "Jimmy Carter's miserable record of personally savaging political opponents * * *" (*Running Mean, The Washington Post*, September 18, 1980, at A18, col. 1), but the paper later endorsed the candidate. *The Washington Post*, October 31, 1980 at A14, col. 1.

finds warrant for such a rubric in this Court's recent decision in *MCFL*. It is important that this Court dispel the confusion thus presented, before the 1988 election campaign is in full swing. Otherwise, the FEC will have unprecedented and unconstitutional leverage to regulate political debate.

A.

The FEC has long endeavored to construe the statutory language "expressly advocating" to cover implied advocacy.

The FEC first intimated a desire to expand the statute's coverage when it adopted a regulation which broadened the concept of "expressly advocating" to include "any communication containing a message advocating election or defeat * * *." 11 C.F.R. 109.1(b)(2). This "definition" failed to include the requirement that the advocacy be express or explicit.

The FEC next signaled its purpose in two cases which it lost, but it did not appeal.

In *Federal Election Commission* v. *American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979) the FEC unsuccessfully claimed it was "express advocacy" to publish a poster featuring a composite photograph of then-Candidate Gerald Ford wearing a button labelled "Pardon Me" and embracing President Nixon. The District Court dismissed the complaint.

In *CLITRIM*, *supra*, the FEC brought action against a group which distributed a publication attacking "big spenders", and giving the voting records of specified Congressmen on tax measures. The Court of Appeals for the Second Circuit *en banc* directed dismissal of the complaint and accused the FEC of attempting to read the Act as though it meant "for the purpose, express *or implied*, of encouraging election or defeat." 616 F.2d at 53 (em-

phasis in original). The Court of Appeals ruled that the FEC's position was "totally meritless". *Ibid.*

The decision below adopts the position rejected in *CLITRIM*, and conflicts with the *en banc* decision of the Second Circuit. The Court of Appeals below ignored the sharp distinction between "express" and "implied", and engaged in an extended search for the implied meaning of the advertisement.

Neither the FEC nor the Court of Appeals attempted to deal with petitioner's straightforward reading of the advertisement.[14] The FEC bluntly argued that a "strict grammatical" approach to the meaning of a publication is "incorrect". It is obvious that a reading is either grammatical or not, and that "strict" is a redundant adjective. *Buckley* mandates a "strict" approach. If one does not apply the established rules of English grammar, there is no standard for determining what a publication expressly advocates.

B.

The FEC hails the opinion below as a "substantive approach" exemplified by this Court's opinion in *MCFL*, *supra*. It argues that "the Supreme Court's own application of the express advocacy standard * * * is based upon a substantive rather than grammatical approach". FEC Opp. at 5. This idea, reflecting further conflict with the Second Circuit's *CLITRIM* decision, calls for prompt corrective action, in advance of the impending election season.

The FEC seeks to support the "substantive" approach by pointing out that the publication which this Court concluded to be "express advocacy" in *MCFL* urged readers to "Vote Pro-Life," and that a reader had to look at other

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[14] As noted in n.3, *supra*, at one point the FEC restated the advertisement exactly as petitioner reads it: an appeal to frustrate the candidate's effort to "hide his record." That goal can be achieved only by public exposure of the true record.

pages to identify the candidates who were "Pro-Life." *Id.* at 5-6. We submit that the statute's requirement that a candidate be "clearly identified" invokes a different standard, and that *MCFL* involved no problems of vagueness and did not disregard grammar or rhetoric.[15] Readers were specifically urged to vote, and the beneficiaries were "clearly identified" by names, photographs, and voting records which specified their "pro-life" characteristics. Petitioner's advertisement would have been comparable to that in *MCFL* if it had said "Vote against the deceptive campaigner", or "Defeat him", but it said nothing about voting or defeating.[16]

We urge that the Court act now to dispel the notion that the phrase "expressly advocating" tolerates distortion of grammar, or permits the generous use of inference. Otherwise the FEC will continue its long-standing effort to construe the words "expressly advocating" as though they read "expressly or impliedly advocating".[17] The FEC

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[15] In fact, *MCFL* reiterated the requirement that " 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc. * * *." 107 S. Ct. at 623.

[16] The FEC also argues that "the examples of express advocacy listed in *Buckley* made clear that the strict grammatical approach was incorrect." FEC Opp. at 7. It argues that "Support Smith" is only express advocacy "if one takes into consideration the external facts that an election is to be held and that Smith is running for office". *Id.* It also argues that "[a]nother example from *Buckley*, 'Smith for Congress,' can only be considered express advocacy by inferring the words of exhortation '*Vote for* Smith for Congress.' " *Id.* at n.4 (emphasis in original). We submit that any suggestion that the *Buckley* examples require the aid of inference flouts their stated purpose, which was to illustrate the meaning of "expressly" and "explicitly".

[17] The concurring opinion of Chief Judge Kaufman and Judge Oakes in *CLITRIM* spoke of "the insensitivity to First Amendment values displayed by the Federal Election Commission * * *." 616 F.2d at 53. It noted that: "an official agency of government * * * created to scrutinize the content of political expression * * * feed[s] upon speech and almost ineluctably come[s] to view un-

is, in effect, encouraged by the opinion below to chill the public exercise of free speech by searching out "intent" and "understanding", and by employing anti-grammar.

IV. The history of this litigation demonstrates that the "express advocacy" language of the Act is too imprecise to satisfy the requirements of the First Amendment.

The Court of Appeals unwittingly displayed the constitutional infirmity of the Act when it said (Pet. App. 9a) that "[a]s this litigation demonstrates, the 'express advocacy' language of *Buckley* and [the Act] does not draw a bright and unambiguous line."

When the comparable provisions of the former Campaign Act were saved from constitutional invalidity by this Court's "express advocacy" formula, the phrase appeared to promise a strict narrow standard. But as there was no actual publication before the Court, the ruling was entirely prospective. It was presumably expected that this language would foreclose the FEC and the courts from seeking to regulate "implied" advocacy, a course that would threaten the freedom of core political speech. The Supreme Court said explicitly that "intention" and "understanding" were not relevant. It recognized that the "express advocacy" language would not present a difficult barrier to persons seeking to circumvent the Act, but that this was a necessary price for preserving "breathing space" for political speech. 424 U.S. at 43-45. This case, however, demonstrates that in practice even the apparently unambiguous "express advocacy" standard invites

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restrained expression as a potential 'evil' to be tamed, muzzled or sterilized. * * * *Buckley* v. *Valeo* * * * imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression. Our discussion today should stand as an admonition to the Commission that, at least in this case, it has failed abysmally to meet this awesome responsibility." *Id.* at 55.

suppression of the right to free expression. The Act is therefore unconstitutional as applied.[18]

The advertisement at issue here is simple and straightforward: nowhere does it say that the readers should defeat Jimmy Carter or vote against him. It describes his temperament and campaign tactics and what these add up to: "It is an attempt to hide his record * * *." It then says that if he "succeeds" the country will suffer under four more years of his style. Rhetorically, "succeeds" is a reference to his "attempt to hide his record." The advertisement then makes its only exhortation: "Don't let him do it". The same exhortation is echoed in the caption to the advertisement.

District Judge Thompson concluded that the advertisement would not bear the reading which the FEC advanced, and that the advertisement "obviously" was not express advocacy of the defeat of Jimmy Carter. At one point the FEC seemingly agreed, and read the advertisement as advocating that candidate Carter should not be allowed to succeed in his attempt to hide his record (see n.3, *supra*). At other points the agency drew other inferences. It argued that the advertisement advocates that Jimmy Carter should not be allowed to succeed in his effort to be re-elected (see n.2, *supra*). More recently it argues that "strict grammatical" reading of the advertisement is not proper.

The Court of Appeals agreed with the District Court that it was a "a very close call," but then concluded that the advertisement was "clearly" and "unambiguously" the "kind" of advocacy covered by the statute. It said that its test of what constitutes "expressly advocating"

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[18] See Clagett and Bolton, *Buckley v. Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 Vanderbilt L. Rev. 1327, 1353-1360 (1976). (The authors were co-counsel for the plaintiffs in *Buckley*.)

agrees with neither the petitioner, the District Court, nor the FEC [19]—and so there are at least four ways to construe the statutory phrase.

Such a confusion of views among the professionals of the bench and bar demonstrates that the statutory phrase "expressly advocating" has proved to be insufficiently narrow and precise to protect core political speech. The standard advanced by the Court of Appeals results in a decision that what the District Court considered to be "obvious" is a position that no reasonable mind could advance. Pet. App. 14a-15a. The three members of the Court of Appeals panel have not only disagreed with the district judge and the parties. *Id.* at 9a. They announced (*id.*) that they could find no guidance in the reported decisions of the First and Second Circuits (other than by "reading between the lines"), and that neither these decisions, nor the briefs of petitioner or the FEC "have supplied us with an analysis of the standard to be used or even a thoughtful list of the factors which we might consider in evaluating an 'express advocacy' dispute."

Petitioner's experience with this 1980 advertisement reveals that the statute is impermissibly vague, in violation of the First Amendment. The "express advocacy" formulation fails to provide a precise standard upon which a citizen can rely.

V. The Act's exemption for newspapers and other media discriminates against ordinary citizens, in violation of the Fifth Amendment.

The exemption provided in the Act for the commercial and institutional press (2 U.S.C. 431(9)(B)(i)) violates the equal protection component of the Fifth Amendment. The First Amendment rights of private citizens such as

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[19] "This concern leads us * * * to reject some of the overly constrictive rules of interpretation that *the parties* urge for our adoption". Pet. App. 11a (emphasis supplied).

petitioner are limited by the Act, while the commercial press is exempted. The press is therefore free to publish editorials which are suggested or even drafted by candidates, without revealing such sponsorship. Similarly, the press is free from the obligation to report its expenditures for advocacy editorials. We submit that if it serves a public purpose to require private citizens to make the disclaimers and disclosures required by the Act, the same public purpose applies to the institutional press, and no rational basis exists for the Act's discrimination.

The appropriate test for appraising the discrimination at issue is set forth in *California Medical Association, supra*, 453 U.S. at 200:

> In order to conclude that [the Campaign Act] nonetheless violates the equal protection component of the Fifth Amendment, we would have to find that because of this provision the Act burdens the First Amendment rights of persons subject to [the Act] to a greater extent than it burdens the same rights of [exempt persons], and that such differential treatment is not justified * * *.

See Police Department of Chicago v. *Mosley*, 408 U.S. 92, 95 (1972); *Carey* v. *Brown*, 447 U.S. 455, 460-462 (1980); *Arkansas Writers' Project, Inc.* v. *Ragland*, 55 U.S. Law Week 4522 (April 22, 1987).

The only reference in the legislative history of the Act to the reason why newspapers, magazines and broadcasting stations are exempt is a statement that Congress wished to "make it plain that it is not the intent of the Congress . . . to limit or burden in any way the first amendment freedoms of the press and of association." H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 4 (1974). We submit that this is an unwarranted discrimination against other citizens. It is well settled that the press is entitled to no greater freedom of speech than private individuals. See *Mills* v. *Alabama, supra*, 384 U.S. at

219 ("the press * * * includes not only newspapers, books, and magazines, but also humble leaflets and circulars"); and *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). Indeed, in *Buckley*, where this Court ultimately struck down the spending limits of an earlier version of the Act, it questioned whether there could be any "principled basis" for exempting the press from the various requirements of the Act. Thus the Court said (424 U.S. at 51 n.56):

> The Act exempts most elements of the institutional press. * * * But, whatever differences there may be between the constitutional guarantee of a free press and of free speech, it is difficult to conceive of any principled basis upon which to distinguish § 608(e)(1)'s limitations upon the public at large and similar limitations upon the press specifically.

Congress' need to avoid the impairment of the political writings of private individuals is just as compelling as it is with respect to the press. Moreover, the costs and pressures involved in participating in a political debate fall even more heavily on a private individual than on the commercal press. The individual citizen is less likely than the smallest newspaper or radio station to exercise substantial influence on the public, and he is more susceptible to pressures to "hedge and trim" to avoid the mere threat of an FEC enforcement action. Why then, exempt the press? The net result of the Act is to further handicap the efforts of private citizens to reach the public forum with views that may be in conflict with those of the commercial press. Accordingly, the case raises a serious Fifth Amendment question which has not been addressed by this Court. The issue was not discussed by the District Court in view of the dismissal of the complaint on other grounds. No reason appears why the question was not decided by the Court of Appeals.

CONCLUSION

The decision of the Court of Appeals constitutes a novel construction of an important federal statute that affects the public's freedom to speak during an election campaign. The decision is contrary to the decision of this Court in *Buckley* v. *Valeo*, and conflicts with a decision of the Second Circuit Court of Appeals. The decision of the court below raises serious questions concerning the constitutionality of the Act which have not previously been considered by this Court, and it is contrary to settled principles of constitutional law. The decision gives vague power to the Federal Election Commission to regulate the political speech of the general public, not many of whom will have petitioner's resources and determination to resist. The approaching Presidential campaign season makes resolution of the issues especially urgent.

This case calls for the exercise of the Court's discretionary power of review.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

		Page
I.	Opinion of the Court of Appeals in *Federal Election Commission* v. *Furgatch*, CA No. 85-5524	1a
II.	Order of the Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing *En Banc* in CA No. 85-5524	18a
III.	Order of the District Court Dismissing the Complaint in *Federal Election Commission* v. *Furgatch*, Civ. No. 83-0596-GT(M)	19a
IV.	Advertisement from *The New York Times*, Tuesday, October 28, 1980 at A29	22a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 85-5524
DC No. CV 83-0596-GT (M)

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellant,

v.

HARVEY FURGATCH,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of California

Honorable Gordon Thompson, Jr., District Judge,
Presiding

Argued and Submitted June 4, 1986
Pasadena, California

[Filed Jan. 9, 1987]

OPINION

Before: GOODWIN and FARRIS, Circuit Judges and Solomon,* District Judge.

FARRIS, Circuit Judge:

Under the Federal Election Campaign Act, a political advertisement which "expressly advocates" either the

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* The Honorable Gus Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

election or defeat of a candidate must be reported to the Federal Election Commission. We must decide whether in this case reporting was required and if so whether the Act meets constitutional demands.

No right of expression is more important to our participatory democracy than political speech. One of the most delicate tasks of First Amendment jurisprudence is to determine the scope of political speech and its permissible regulation. This appeal requires us to resolve the conflict between a citizen's right to speak without burden and society's interest in ensuring a fair and representative forum of debate by identifying the financial sources of particular kinds of speech.

I.

On October 28, 1980, one week prior to the 1980 presidential election, the *New York Times* published a full page advertisement captioned "Don't let him do it," placed and paid for by Harvey Furgatch. The advertisement read:

> DON'T LET HIM DO IT.
>
> The President of the United States continues degrading the electoral process and lessening the prestige of the office.
>
> It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.
>
> *And we let him.*
>
> It continued when the President himself accused Ronald Reagan of being unpatriotic.
>
> *And we let him do it again.*
>
> In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others with public funds.

We are letting him do it.

He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between "peace and war," "black or white," "north or south," and "Jew vs. Christian." His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not the Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning.

DON'T LET HIM DO IT.

On November 1, 1980, three days before the election, Furgatch placed the same advertisement in *The Boston Globe*. Unlike the first advertisement, which stated that it was paid for by Furgatch and was "[n]ot authorized by any candidate," the second advertisement omitted the disclaimer. The two advertisements cost Furgatch approximately $25,000.

On March 25, 1983, the Federal Election Commission brought suit against Furgatch under the Federal Election Campaign Act, 2 U.S.C. § 437g(a)(6)(A).[1] The FEC sought a civil penalty and an injunction against

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[1] Section 437g(a)(6)(A) provides:

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

further violation of the Act. It alleged that Furgatch violated 2 U.S.C. § 434(c)[2] by failing to report his expenditures and 2 U.S.C. § 441d[3] by failing to include a

[2] Section 434(c)(1) requires that any person making an "independent expenditure" greater than $250 file a statement with the FEC. The contents of the statement are specified in 434(c)(2), which provides:

> Statements . . . shall include:
>
> (A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;
>
> (B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and
>
> (C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

The term "independent expenditure is defined as follows in § 431(17):

> (17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

[3] Section 441d provides:

> (a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—
>
> * * * *
>
> (3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the

disclaimer in *The Boston Globe* advertisement. Furgatch moved for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The district court orally granted the motion to dismiss and on December 10, 1984 entered its final order. It concluded that the advertisement was not an "independent expenditure" within the meaning of the statute because it did not "expressly advocate" the defeat of Jimmy Carter. The court did not rule on the constitutional issues raised by Furgatch.

The FEC timely appealed. This court has jurisdiction under 28 U.S.C. § 1291 and 2 U.S.C. § 437g(a)(g). We review *de novo* under rule 12(b)(6). *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986).

II.

Individuals who make independent expenditures totalling more than $250 must file a statement with the FEC. 2 U.S.C. § 434(c). The Federal Election Campaign Act defines an "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate. . . ." 2 U.S.C. § 431(17). The Supreme Court has previously passed upon the constitutionality of the Act's disclosure requirements in *Buckley v. Valeo*, 424 U.S. 1 (1976).

The disclosure provisions for independent expenditures were originally written more broadly, to cover any expenditures made "for the purpose of . . . influencing" the nomination or election of candidates for federal office. Reviewing section 434(e) (the forerunner to the provisions before us) in *Buckley*, the Supreme Court held that any restriction on political speech—even restrictions that are far from absolute—can have a chilling effect on speech. "In its effort to be all-inclusive,

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name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

. . . the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring those sanctions may deter those who seek to exercise protected First Amendment rights." 424 U.S. at 76-77.

The Court reasoned that Congress may place restrictions on the freedom of expression for legitimate reasons, but that those restrictions must be minimal, and closely tailored to avoid overreaching or vagueness. *Id.* at 78-82. Consequently, the Court was obliged to construe the words of section 434(e) no more broadly than was absolutely necessary to serve the purposes of the Act, to avoid stifling speech that does not fit neatly in the category of election advertising. *Id.* at 78. The Court was particularly insistent that a clear distinction be made between "issue discussion," which strongly implicates the First Amendment, and the candidate-oriented speech that is the focus of the Campaign Act. *Id.* at 79.

The Court concluded that the only expenditures covered by the disclosure provisions were funds used for comunications that "expressly advocate the election or defeat of a clearly identified candidate." *Id.* It gave examples, in a footnote, of words of express advocacy, including "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *See id.* at 80, n.108 (incorporating by reference *id.* at 44, n.52). Congress' later revision of the Act, now before us, directly adopted the "express advocacy" standard of *Buckley* into sections 431(17) and 441(d). *See* H.R. Rep. No. 1057, 94th Cong., 2d Sess. 38 (1976), reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1976, 1032 (GPO 1977)[.] That standard is designed to limit the coverage of the disclosure provision "precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80.

We must apply sections 434(c) and 441(d) consistently with the constitutional requirements set out in *Buckley*.

III.

The FEC argues that Furgatch's advertisement expressly advocates the defeat of Jimmy Carter and therefore is an independent expenditure which must be reported to the FEC. The examples of express advocacy contained in the *Buckley* opinion (i.e., "vote for," "support," etc.), the FEC argues, merely provide guidelines for determining what constitutes "express advocacy." Whether those words are contained in the advertisement is not determinative. The test is whether or not the advertisement contains a message advocating the defeat of a political candidate. Furgatch's advertisement, the FEC contends, contains an unequivocal message that Carter must not "succeed" in "burden[ing]" the country with "four more years" of his allegedly harmful leadership.

The FEC further argues that the advertisement is, in the words of the Supreme Court, "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. Nothing more, it contends, is required to place this advertisement under coverage of the Act. The FEC grounds this argument on the Court's effort in *Buckley* to distinguish between speech that pertains only to candidates and their campaigns and speech revolving around political issues in general. The FEC argues that because the advertisement discusses Carter, the candidate, rather than the political issues, Furgatch must report the expenditure.

Furgatch responds that the mere raising of any question on this issue demonstrates that it is not express advocacy. We would not be debating the meaning of the advertisement, he contends, if it were express. He argues that the words "don't let him do it" do not expressly call

for Carter's defeat at the polls but an end to his "attempt to hide his own record, or lack of it." The advertisement, according to Furgatch, is merely a warning that Carter will be re-elected if the public allows him to continue to use "low-level campaign tactics."

As the district court noted, whether the advertisement expressly advocates the defeat of Jimmy Carter is a very close call. We have not had occasion to consider the scope of the Act before now. Few other courts of appeals have dealt with the issue.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 769 F.2d 13 (1st Cir. 1985), the First Circuit considered an advertisement in which an anti-abortion group published a "Special Election Edition" of its newsletter which contained photographs of candidates identified as "pro-life." The publication included at least two exhortations to "vote pro-life" and the statement: "Your vote in the primary will make the critical difference in electing pro-life candidates." The court ruled that the "Special Election Edition . . . explicitly advocated the election of particular candidates in the primary elections and presented photographs of those candidates only," and thus fell within the FEC's regulatory sphere.

In *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980), the Second Circuit addressed the applicability of the statute to a leaflet which expounded the economic views of a tax reform group and critized the voting record of a local member of Congress, whose picture was included. The leaflet, however, did not refer to any federal election or to the member's political affiliation or opponent. The court held that because the leaflet did not expressly advocate the defeat or election of the congressman, the Act did not apply to the pamphlet. The leaflet "contains nothing which could rationally be termed express advocacy . . . there is no

reference anywhere in the Bulletin to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman Ambra." *Id.* at 53.

Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost *sui generis*, offering limited guidance for subsequent decisions. The decisions of the First and Second Circuits are not especially helpful beyond the general interpretive principles we can find between the lines of those rulings. Neither these decisions nor counsel for the parties here have supplied us with an analysis of the standard to be used or even a thoughtful list of the factors which we might consider in evaluating an "express advocacy" dispute. Without such a framework, the federal courts risk an inconsistent analysis of each case involving the meaning of "express advocacy."

IV.

As this litigation demonstrates, the "express advocacy" language of *Buckley* and section 413(17) does not draw a bright and unambiguous line. We are called upon to interpret and refine that standard here. Mindful of the Supreme Court's directive that, where First amendment concerns are present, we must construe the words of the regulatory statute precisely and narrowly, only as far as is necessary to further the purposes of the Act, we first examine those purposes in some detail for guidance.

In *Buckley*, the Court described the function of section 434(e) as follows:

> Section 434(e) is part of Congress' effort to achieve 'total disclosure' by reaching 'every kind of political

> activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible. The provision is responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act.

424 U.S. at 76.

Thus there are two important goals behind these disclosure provisions. The first, that of keeping the electorate fully informed of the sources of campaign-directed speech and the possible connections between the speaker and individual candidates, derives directly from the primary concern of the First Amendment. The vision of a free and open marketplace of ideas is based on the assumption that the people should be exposed to speech on all sides, so that they may freely evaluate and choose from among competing points of view. One goal of the First Amendment, then, is to ensure that the individual citizen has available all the information necessary to allow him to properly evaluate speech.

Information about the composition of a candidate's constituency, the sources of a candidate's support, and the impact that such financial support may have on the candidate's stand on the issues or future performance may be crucial to the individual's choice from among the several competitors for his vote. If only part of the picture is disclosed, the market in ideas has a crippling and coercive, rather than a healthy and liberating effect on the development of social and political institutions. Therefore, disclosure requirements, which may at times inhibit the free speech that is so dearly protected by the First Amendment, are indispensible to the proper and effective exercise of First Amendment rights. The allow-

ance of free expression loses considerable value if expression is only partial.

The other major purpose of the disclosure provision is to deter or expose corruption, and therefore to minimize the influence that unaccountable interest groups and individuals can have on elected federal officials. The disclosure requirement is particularly directed at attempts by candidates to circumvent the statutory limits on their own expenditures through close and secretive relationships with apparently "independent" campaign spenders. The Supreme Court noted that efforts had been made in the past to avoid disclosure requirements by the routing of campaign contributions through unregulated independent advertising. Since *Buckley* was decided, such practices have apparently become more widespread in federal elections, and the need for controls more urgent. *See, e.g.*, "The $676,000 Cleanup," *The New Republic*, Vol. 195, No. 22 (December 1, 1986) at 7.

We conclude that the Act's disclosure provisions serve an important Congressional policy and a very strong First Amendment interest. Properly applied, they will have only a "reasonable and minimally restrictive" effect on the exercise of First Amendment rights. *Buckley*, 442 U.S. at 82. Although we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act. We must read section 434(c) so as to prevent speech that is clearly intended to effect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act. This concern leads us to fashion a more comprehensive approach to the delimitation of "express advocacy," and to reject some of the overly constrictive rules of interpretation that the parties urge for our adoption.

V.

A

We begin with the proposition that "express advocacy" is not strictly limited to communications using certain key phrases. The short list of words included in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. "Independent" campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.

B

A proper understanding of the speaker's message can best be obtained by considering speech as a whole. Comprehension often requires inferences from the relation of one part of speech to another. The entirety may give a clear impression that is never succinctly stated in a single phrase or sentence. Similarly, a stray comment viewed in isolation may suggest an idea that is only peripheral to the primary purpose of speech as a whole. Furgatch would have us reject intra-textual interpretation and construe each part of speech independently, requiring express advocacy from specific phrases rather than from speech in its entirety.

We reject the suggestion that we isolate each sentence and act as if it bears no relation to its neighbors. This is not to say that we will not examine each sentence in an effort to understand the whole. We only recognize that the whole consists of its parts in relation to each other.

C

The subjective intent of the speaker cannot alone be determinative. Words derive their meaning from what the speaker intends and what the reader understands. A speaker may expressly advocate regardless of his intention, and our attempts to fathom his mental state would distract us unnecessarily from the speech itself. Interpreting political speech in this context is not the same as interpreting a contract, where subjective intent underlies the formation and construction of the contract and would be the explicit focus of interpretation were it not for the greater reliability of the objective terms. The intent behind political speech is less important than its effect for the purposes of this inquiry. *But see Thomas v. Collins*, 323 U.S. 516, 535 (1945), quoted in *Buckley*, 424 U.S. at 43.

D

More problematic than use of "magic words" or inquiry into subjective intent are questions of context. The FEC argues, for example, that this advertisement cannot be construed outside its temporal context, the 1980 presidential election. Furgatch, on the other hand, maintains that the court must find express advocacy in the speech itself, without reference to external circumstances.

The problem of the context of speech goes to the heart of some of the most difficult First Amendment questions. The doctrines of subversive speech, "fighting words," libel, and speech in the workplace and in public fora illustrate that when and where speech takes place can determine its legal significance. In these instances, context is one of the crucial factors making these kinds of speech regulable. First Amendment doctrine has long recognized that words take part of their meaning and effect from the environment in which they are spoken. When the constitutional and statutory standard is "ex-

press advocacy," however, the weight that we give to the context of speech declines considerably. Our concern here is with the clarity of the communication rather than its harmful effects. Context remains a consideration, but an ancillary one, peripheral to the words themselves.

We conclude that context is relevant to a determination of express advocacy. A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers. We should not ignore external factors that contribute to a complete understanding of speech, especially when they are factors that the audience must consider in evaluating the words before it. However, context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words.

VI.

With these principles in mind, we propose a standard for "express advocacy" that will preserve the efficacy of the Act without treading upon the freedom of political expression. We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented to the clearest, most explicit language, speech is "express" for present purposes if its message is ummistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly

identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements. This is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act. Under this standard, the court is not forced to ignore the plain meaning of campaign-related speech in a search for certain fixed indicators of "express advocacy."

VI.

Applying this standard to Furgatch's advertisement, we reject the district court's ruling that it does not expressly advocate the defeat of Jimmy Carter. We have no doubt that the ad asks the public to vote against Carter. It cannot be read in the way that Furgatch suggests.

The bold print of the advertisement pleads: "Don't let him do it." The district court determined that the focus of the inquiry, and the message of the ad, is the meaning of the word "it." Under the district court's analysis, only if "it" is a clear reference to Carter's reelection, supported by the text of the ad, could one find express advocacy. The district court accepted the arguments of Furgatch that "it" may plausibly be read to refer to Carter's degradation of his office, and his manipulation of the campaign process. The ad deplores Carter's "attempt to hide his own record," his "legacy of low-level campaigning," his divisiveness and "meanness of spirit," and his "incoherencies, ineptness, and illusion." As the district court viewed it, although the advertisement criticizes Carter's campaign tactics, it never refers to the election or to voting against Carter. The words "don't let him do it" urge readers to stop Carter from doing those things now and in the future.

We disagree with the district court that the word "it" is the proper focus of the inquiry. There is no question what "it" is—"it" is all the things that the ad accuses Jimmy Carter of doing, the litany of abuses and indiscretions that constitutes the body of the statement. The pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it. The words we focus on are "don't let him." They are simple and direct. "Don't let him" is a command. The words "expressly advocate" action of some kind. If the action that Furgatch is urging the public to take is a rejection of Carter at the polls, this advertisement is covered by the Campaign Act.

In Furgatch's advertisement we are presented with an express call to action, but no express indication of what action is appropriate. We hold, however, that this failure to state with specificity the action required does not remove political speech from the coverage of the Campaign Act when it is clearly the kind of advocacy of the defeat of an identified candidate that Congress intended to regulate.

Reasonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter. This was the only action open to those who would not "let him do it." The reader could not sue President Carter for his indelicate remarks, or arrest him for his transgressions. If Furgatch had been seeking impeachment, or some form of judicial or administrative action against Carter, his plea would have been to a different audience, in a different forum. If Jimmy Carter was degrading his office, as Furgatch claimed, the audience to whom the ad was directed must vote him out of that office. If Jimmy Carter was attempting to buy the election, or to win it by "hid[ing] his own record, or lack of it," as Furgatch suggested, the only way to not let him do it was to give the election to someone else. Although the ad may be evasively written, its meaning is clear.

Our conclusion is reinforced by consideration of the timing of the ad. The ad is bold in calling for action, but fails to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in. It refers repeatedly to the election campaign and Carter's campaign tactics. Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.

Finally, this advertisement was not issue-oriented speech of the sort that the Supreme Court was careful to distinguish in *Buckley*, and the Second Circuit found to be excluded from the coverage of the Act in *Central Long Island Tax Reform*. The ad directly attacks a candidate, not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign. It is the type of advertising that the Act was enacted to cover.

There is vagueness in Furgatch's message, but no ambiguity. Furgatch was obligated to file the statement and make the disclosures required for any "independent expenditure" under the Federal Election Campaign Act. He is liable for the omission.

We do not address Furgatch's constitutional claims except to note that the constitutionality of the provisions at issue was reviewed in *Buckley*, and the standard set forth by the Supreme Court in that case was incorporated in the Act in its present form. Treatment of those constitutional issues is implicit in our disposition of the statutory question.

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 85-5524

DC No. CV 83-0596-GT (M)
(Southern California)

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellant,

v.

HARVEY FURGATCH,
Defendant-Appellee.

[Filed Apr. 23, 1987]

ORDER

Before: GOODWIN, FARRIS, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Goodwin and Farris have voted to reject the suggestion for rehearing en banc and Judge Solomon recommended rejection.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, participated in the decision of this case prior to his death February 15, 1987.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 83-0596-GT(M)

FEDERAL ELECTION COMMISSION,
Plaintiff,

v.

HARVEY FURGATCH,
Defendant.

[Filed Nov. 23, 1984]

ORDER

Defendant Furgatch's motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint for failure to state a claim is hereby granted.

As noted at the hearing of November 21, 1983, the Court finds that, although it is a very close call, the political advertisements placed by defendant Furgatch do not, as required by 2 U.S.C. §§ 434(c) and 441d(a), constitute "communications expressly advocating the election or defeat of a clearly identified candidate." In making this determination, the Court is particularly mindful of footnote 52 of the Supreme Court's opinion in *Buckley v. Valeo*, 424 U.S. 1, 44 (1976), which restricted the application of an analogous section of the Federal Election Campaign Act to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" The

Court is also mindful that neither the purpose nor the effect of a political advertisement is determinative of the issue of whether the ad expressly advocates the election or defeat of a clearly identified candidate. *See Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 53 (2d Cir. 1980); *Federal Election Commission v. American Federation of State County and Municipal Employees*, 471 F. Supp. 315, 316 (D.D.C. 1979).

In applying the "express advocacy" standard to the advertisements at issue in the instant case, it is apparent that the inquiry can be immediately narrowed to an analysis of the phrase "Don't let him do it." As both parties recognize, the remaining language of the ad contains, at most, an implied message not to vote for President Carter and, as such, is beyond the scope of the Campaign Act. The pivotal question thus becomes whether the phrase "Don't let him do it" is the equivalent of the expression "vote against Carter."

In order to answer this question, it is first necessary to ascertain the reference of the word "it." In other words, it is necessary to determine what "it" is that the reader of the ad is not supposed to let President Carter do. In the Court's view, a careful reading of the ad reveals that the reader is being exhorted not to let President Carter "hide his own record" or "degrade the electoral process and lessen the prestige of the office."

But how is the reader supposed to prevent the President from hiding his record and degrading the electoral process? Does the ad ask the reader to vote against the President? That, of course, is the position taken, of necessity, by the FEC.

Unfortunately, the Court does not feel that the ad will bear such a reading. A careful analysis of the ad reveals that whatever "it" was that the reader of the ad was supposed to do, it was something that *could*

have been done "months" or "weeks" before the date the ad was published.[1] But months or weeks before the ad was published there had not been a presidential election. Hence, the range of actions expressly recommended by the ad obviously did include voting the President out of office.

Finally, the Court notes that since it has decided this case on grounds of statutory construction, it is neither necessary nor desirable to reach the defendant's constitutional challenges to sections 434(c) and 441d. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981).

IT IS SO ORDERED.

DATED: November 20, 1984

/s/ Gordon Thompson Jr
GORDON THOMPSON, JR.
Chief Judge
United States District Court

cc: Plaintiff
Defendant

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[1] For example, the ad rebukes the reader for letting the President remain silent when his running mate outrageously suggested, "months ago," that Ted Kennedy was unpatriotic. Similarly, the ad criticizes the reader for letting Carter, "in recent weeks," try to buy entire cities with public funds.

Don't let him do it.

The President of the United States continues degrading the electoral process and lessening the prestige of the office.

It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And we let him.

It continued when the President himself accused Ronald Reagan of being unpatriotic.

We let him do it again.

In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others, with public funds.

We are letting him do it.

He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between "peace or war," "black or white," "north or south," and "Jew vs. Christian." His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not The Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning.

Don't let him do it.

BEST AVAILABLE COPY

22a

Paid for by Harvey Furgatch, citizen, P.O. Box 22205, San Diego, CA 92122
Not authorized by any candidate.

Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-108

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARVEY FURGATCH, PETITIONER

v.

FEDERAL ELECTION COMMISSION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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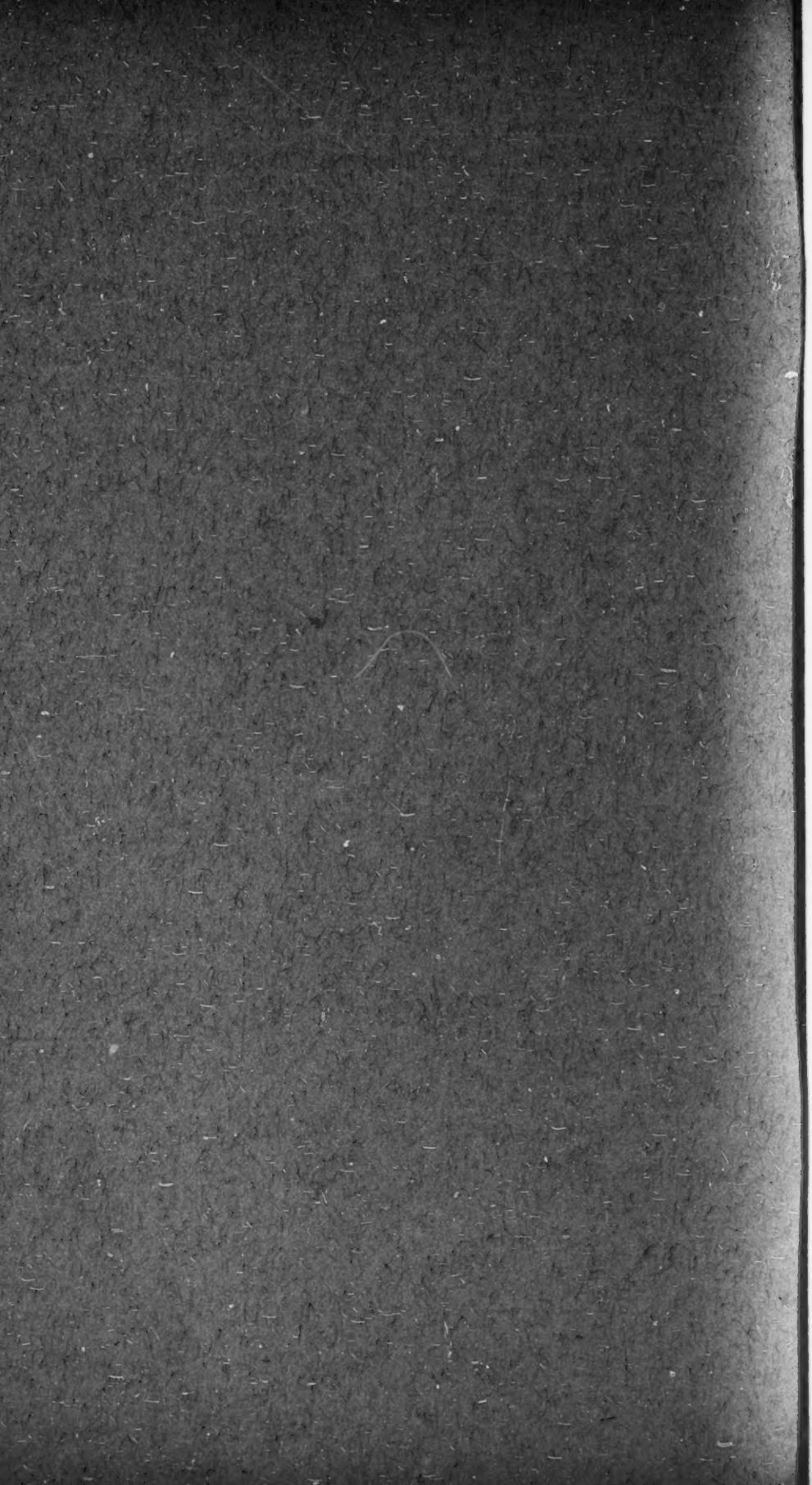
AUGUST 21, 1987



QUESTIONS PRESENTED

1. Whether the court of appeals properly found that an advertisement exhorting readers not to let Jimmy Carter succeed in obtaining "four more years" expressly advocated Carter's defeat in the 1980 presidential election three days later, so that it was subject to the disclosure requirements of 2 U.S.C. §§ 434 (c) and 441d.

2. Whether the court of appeals properly concluded that 2 U.S.C. §§ 434(c) and 441d are not unconstitutional.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Background	2
B. The Decision Of The Court Below	3
ARGUMENT	6
CONCLUSION	15
APPENDIX	

TABLE OF AUTHORITIES

Cases

Athens Lumber Co. v. FEC, 689 F.2d 1006 (11th Cir. 1982), 718 F.2d 363 (11th Cir. 1983) (en banc), *appeal dismissed, cert. denied*, 465 U.S. 1092 (1984)	13
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	10
Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976)	*passim*
California Medical Ass'n v. FEC, 453 U.S. 182 (1981)	13, 14, 15
EEOC v. FLRA, 106 S. Ct. 1678 (1986)	10
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	9
FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979)	11
FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) (en banc)	8, 11

Cases—Continued

Page

FEC v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616 (1986) ..... *passim*
FEC v. National Right to Work Committee, 459 U.S. 197 (1982) 13
Furgatch v. FEC, No. 85-0720-N(M) (S.D. Cal. filed March 6, 1985) 5
Furgatch v. USDC-CAS, No. 87-7180 CIVATT (9th Cir. filed April 30, 1987) 6
G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) 10
Schweiker v. McClure, 456 U.S. 188 (1982) 11
Thomas v. Collins, 323 U.S. 516 (1945) 10, 11
Withrow v. Larkin, 421 U.S. 35 (1975) 11
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 15

United States Constitution

First Amendment 6, 12, 15
Fifth Amendment 12

Statutes and Regulations

2 U.S.C. § 431(9)(B)(i) 13, 14
431(17) 2
434 14
434(c) 2, 3
437g(a)(6)(A) 3
437h 5
441b 15
441d 3, 4
441d(a) 3
441d(a)(3) 2
28 U.S.C. § 1254(1) 2
Fed. R. App. P. 21(b) 6
Fed. R. App. P. 40(a) 13

Legislative History

H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. (1976) 12

In the Supreme Court of the United States

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FEDERAL ELECTION COMMISSION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is published at 807 F.2d 857 (9th Cir. 1987). The order of the court of appeals denying a petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 18a) and the order of the district court (Pet. App. 19a-21a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1987, and on April 23, 1987 that court denied Mr. Furgatch's petition for rehearing and suggestion for rehearing *en banc*. The Petition for

a *Writ of Certiorari* was filed on July 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reprinted in the Appendix to this brief.

STATEMENT OF THE CASE

A. Background

The Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-455 ("the Act") requires that all independent "communications expressly advocating the election or defeat of a clearly identified candidate" must "clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. § 441d(a)(3). The Act also requires that anyone making "independent expenditures" (defined in 2 U.S.C. § 431(17) as an expenditure "expressly advocating the election or defeat of a clearly identified candidate") in excess of an aggregate of $250 in a calendar year must file a report with the Commission for public availability. 2 U.S.C. § 434(c).

One week prior to the 1980 general presidential election, Harvey Furgatch placed a full page advertisement in the *New York Times*. Captioned "Don't let him do it," the advertisement accused Jimmy Carter of "degrading the electoral process and lessening the prestige of the office" in a variety of ways. It then warned: "If he succeeds the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning. **Don't let him do it.**" (Pet. App. 22a).

Three days before the general election, Harvey Furgatch placed the same advertisement in the *Boston Globe*. Unlike the first advertisement, which stated that it was paid for by Harvey Furgatch and was "[n]ot authorized by any candidate," the second advertisement omitted the disclaimer that it was "not authorized by any candidate." The two advertisements cost Mr. Furgatch a total of approximately $25,000. (Pet. App. 3a).

Upon the foregoing facts, the Commission found probable cause to believe that Mr. Furgatch had violated 2 U.S.C. § 434(c) by failing to report his expenditures for these advertisements, and violated 2 U.S.C. § 441d by failing to include the disclaimer in the *Boston Globe* advertisement. When conciliation efforts proved unsuccessful, the Commission authorized the filing of this civil action pursuant to 2 U.S.C. § 437g(a)(6)(A).

B. The Decision Of The Court Below

Finding that, on the facts presented, "[r]easonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter" (Pet. App. 16a), the court of appeals concluded that "Furgatch was obligated to file the statement and make the disclosures required for any 'independent expenditure' under the Federal Election Campaign Act" (Pet. App. 17a).[1] Explicitly acknowledging its obligation to "apply sections 434(c)

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[1] The district court had dismissed the case, finding that "although it is a very close call, the political advertisements placed by defendant Furgatch do not, as required by 2 U.S.C. §§ 434(c) and 441d(a), constitute 'communications expressly advocating the election or defeat of a clearly identified candidate'" (Pet. App. 19a).

and [441d] consistently with the constitutional requirements set out in *Buckley* [v. *Valeo*, 424 U.S. 1 (1976)]" (Pet. App. 7a), the court of appeals carefully measured the particular facts of this case against this Court's explanation of the "express advocacy" standard. The court observed that the determination in each case of whether a particular communication contains "express advocacy" is primarily a factual one (Pet. App. 9a), and concluded that the English language is too flexible a tool of communication to permit reducing this inquiry to a rigid formula that would be determinative in all cases (Pet. App. 12a-14a). Nevertheless, the court emphasized that the statute was narrowly limited to communications containing language "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. . . . [I]f any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements" (Pet. App. 14a-15a).

The court found that the language of Mr. Furgatch's advertisement left "no doubt that the ad asks the public to vote against Carter" (Pet. App. 15a).

> The words we focus on are "don't let him." They are simple and direct. "Don't let him" is a command. The words "expressly advocate" action of some kind. If the action that Furgatch is urging the public to take is a rejection of Carter at the polls, this advertisement is covered by the Campaign Act.
>
> . . . .
>
> Reasonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter. This was the only action open to those who would not "let him do it." The

> reader could not sue President Carter for his indelicate remarks, or arrest him for his transgressions. If Furgatch had been seeking impeachment, or some form of judicial or administrative action against Carter, his plea would have been to a different audience, in a different forum. If Jimmy Carter was degrading his office, as Furgatch claimed, the audience to whom the ad was directed must vote him out of that office. If Jimmy Carter was attempting to buy the election, or to win it by "hid[ing] his own record, or lack of it," as Furgatch suggested, the only way to not let him do it was to give the election to someone else. . . .
>
> . . . Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.

(Pet. App. 16a-17a).

Finally, the court summarily rejected Mr. Furgatch's constitutional challenges to the statute on the ground "that the constitutionality of the provisions at issue was reviewed in *Buckley*, and the standard set forth by the Supreme Court in that case was incorporated in the Act in its present form" (Pet. App. 17a).[2]

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[2] Several months after the district court's decision in this case, Mr. Furgatch filed a separate suit seeking, pursuant to 2 U.S.C. § 437h, certification to the *en banc* court of appeals of the same constitutional arguments raised as affirmative defenses in this case. *Furgatch v. FEC*, No. 85-0720-N(M) (S.D. Cal. filed March 6, 1985). A different district court judge dismissed the second case for lack of case or controversy because of the outstanding judgment in this case that Mr. Furgatch's activities were not subject to the statute he was challenging. When the court of appeals reversed the decision in this case, it also vacated the dismissal in the second case

On April 23, 1987, the panel unanimously rejected Mr. Furgatch's petition for rehearing, and no judge of the Ninth Circuit requested a vote on his suggestion for rehearing *en banc* (Pet. App. 18a). Mr. Furgatch filed the Petition for *Writ of Certiorari* on July 20, 1987.[3]

ARGUMENT

The decision below raises no significant issues of statutory construction or constitutional law that have not been dealt with by this Court before. This Court upheld the constitutionality of the predecessor of the reporting and disclosure requirements at issue here in *Buckley v. Valeo*, 424 U.S. 1, 80-81 (1976), and just last Term, in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. 616, 623 (1986), the Court reaffirmed that the "express advocacy" standard contained in those provisions satisfies the First Amend-

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which had been based upon that decision. In its order remanding the second case, however, the court noted that in this case it had already upheld the constitutionality of the Act as applied to Mr. Furgatch. Nevertheless, Mr. Furgatch again petitioned the district court to certify his constitutional challenges to the *en banc* court of appeals, and the district court denied that motion during a hearing on April 6, 1987. On April 30, 1987, Mr. Furgatch filed a petition with the *en banc* court of appeals, requesting a writ of mandamus ordering the district court to certify his constitutional challenges to the *en banc* court. *Furgatch v. USDC-CAS*, No. 87-7180 CIVATT (9th Cir. filed April 30, 1987). To date, no action has been taken on Mr. Furgatch's petition, and the Commission has not been requested to respond to it. *See* Fed. R. App. P. 21(b).

[3] Mr. Furgatch did not request a stay of mandate from the court of appeals and during a hearing on July 13, 1987, the district court denied Mr. Furgatch's motion to suspend further proceedings on remand pending resolution of his *certiorari* petition.

ment concerns relied upon by Petitioner. The court of appeals' assessment of Mr. Furgatch's advertisement under that standard turns upon the particular facts of this case, and thus does not necessarily indicate how courts will assess other communications in other circumstances. Such a fact-dependent determination does not warrant plenary review by this Court, particularly since this Court discussed the proper application of the express advocacy standard only last Term in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623, and applied it in a manner consistent with that of the court of appeals in this case.

1. The court of appeals' finding that Mr. Furgatch's advertisements expressly advocated the defeat of Jimmy Carter in the imminent presidential election is amply supported by the record in this case. Indeed, the advertisements discussed nothing other than Jimmy Carter's reelection campaign. They accused Carter of labelling his opponents in the primary and general elections as unpatriotic, of attempting to use federal funds to buy special interest votes, of campaigning in a manner that "cultivate[s] the fears, not the hopes, of the voting public," and of attempting "to hide his own record, or lack of it." These campaign tactics, the advertisements asserted, were "degrading the electoral process and lessening the prestige of the office." (Pet. App. 22a).

Petitioner asserts (Pet. 15) that mere criticism of how an election campaign is run does not amount to "express advocacy" under the Act. But that argument is inapposite here, for Mr. Furgatch's advertisements did not merely criticize Jimmy Carter's reelection campaign. Instead, they went on to warn that if Carter "succeeds, the country will be burdened with four more years of incoherencies, ineptness, and

illusion," an unmistakable reference to Carter's election to another presidential term. This warning was followed immediately by the explicit exhortation, in bold print three lines high, **"Don't let him do it."** Plainly, the only way a reader could stop Carter from "succeed[ing]" in "burden[ing]" the country with "four more years" of his assertedly inadequate leadership was to defeat Carter in his bid for reelection.[4]

Petitioner argues (Pet. 17) that the court of appeals' decision conflicts with "the established rules of English grammar," but neither in his Petition to this Court nor in the court below has he ever specified any such "established rule" that conflicts with the result reached by the court of appeals. Petitioner argues (Pet. 17 n.14) that the advertisements actually called only for exposure of Carter's record. But far from being required by rules of grammar, this argument can only be made by ignoring the advertisement's explicit statement that if Carter "succeeds" in what it

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[4] These facts demonstrate why the decision in *FEC v. Central Long Island Tax Reform Immediately Committee ("CLITRIM")*, 616 F.2d 45 (2d Cir. 1980) (en banc), does not conflict with the decision here, as alleged by Petitioner (Pet. 16-17). The leaflet at issue in *CLITRIM* advocated lower taxes and listed a local congressman's votes on a certain tax bill, but it contained "no reference anywhere . . . to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman Ambro." 616 F.2d at 53. The only exhortation in the leaflet in that case called for communication with the congressman on the issue of taxes, not action against him. Far from rejecting the Second Circuit's conclusion that this leaflet did not contain express advocacy of an election result, the court below explicitly agreed that *CLITRIM* involved only "issue-oriented speech" (Pet. App. 17a).

asks the reader to stop him from doing, "the country will be burdened with four more years" of Carter's leadership. While Carter's alleged hiding of his record is certainly one of the criticized campaign tactics that the advertisement accuses the reader of permitting Carter to pursue successfully, the cumulative success of all those criticized campaign tactics in obtaining "four more years" of Carter's presidency is what the advertisement exhorts the reader to prevent. This is confirmed by the advertisement's publication only three days before the election, when voting against Carter was the only action left to defeat Carter's reelection bid. As this Court explained in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623, "[t]he fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." [5]

Petitioner makes no other arguments why the result reached in this case was erroneous. Rather, he takes issue with a number of the lower court's general statements regarding law and policy, taken out of their context in a lengthy and discursive opinion. It is well settled, however, that "[t]his Court . . . reviews judgments, not statements in opinions." *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978),

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[5] Petitioner argues (Pet. 17-18) that *FEC v. Massachusetts Citizens for Life, Inc.* is inapposite here because that case involved whether the supported candidates were clearly identified and "the statute's requirement that a candidate be 'clearly identified' invokes a different standard" than whether advocacy is express. But in *Buckley v. Valeo*, 424 U.S. at 43, this Court equated the two, stating that express advocacy requires "explicit words of advocacy of election or defeat of a candidate, much as the definition of 'clearly identified' . . . requires . . . an explicit and unambiguous reference to the candidate . . . ."

quoting Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956). Since, as we have shown, the Ninth Circuit's finding that Mr. Furgatch's advertisements contained express advocacy is entirely consistent with this Court's precedents, Petitioner's disagreements with the Ninth Circuit's general discussion of express advocacy provide no basis for granting plenary review.[6] Petitioner's similar disagreements with state-

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[6] Many of Petitioner's arguments simply misconstrue the court of appeals' views. For example, Petitioner asserts (Pet. 13) that " 'intent' appears to be the controlling and guiding factor in the opinion of the Court of Appeals," although the court of appeals dismissed this factor with the observation that "our attempts to fathom [Mr. Furgatch's] mental state would distract us unnecessarily from the speech itself" (Pet. App. 13a). Petitioner is also misguided in his attempt (Pet. 9-10) to equate the discussion of express advocacy in this case with the broader "clear advocacy" standard adopted by the court of appeals in *Buckley v. Valeo*, 519 F.2d 821, 853 (D.C. Cir. 1975), which was narrowed to express advocacy by this Court on appeal, 424 U.S. at 41-44. Initially, since Petitioner never made this argument below, he is foreclosed from advancing it for the first time in this Court. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982); *EEOC v. FLRA*, 106 S. Ct. 1678, 1681 (1986). In any event, this Court rejected the court of appeals' "clear advocacy" standard in *Buckley* because it would have permitted speech designed only to advance issues associated with a candidate to be construed as promoting the candidate's election, thus putting the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley v. Valeo*, 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). The court of appeals in this case, by contrast, applied the narrower "express advocacy" standard in a manner that forecloses the possibility of varying inferences by limiting the reach of the statute to communications "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a

ments and phrases taken out of context from the briefs filed below by the Commission's appellate attorneys (Pet. 4-5, 7-8, 17-18, 20) provide even less of a basis for granting review. Accordingly, these arguments need not be specifically addressed here.

Petitioner's attack (Pet. 16-19) upon the Commission's motives in bringing this case is completely unsupported by the evidence he cites.[7] The Commission's loss of two cases[8] involving the express advocacy issue in the early aftermath of *Buckley v. Valeo*, 424 U.S. 1 (1976), hardly demonstrates the sort of concerted agency campaign to broaden the statute described by Petitioner. To the contrary, the Commission accepted both of those decisions without even an appeal, and has successfully endeavored to comply with them since. Indeed, there has been only one other reported court case involving this issue in this decade, and this Court resolved the express advocacy issue in that case in the Commission's favor last Term. *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623. Petitioner's allegations pro-

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specific candidate" (Pet. App. 14a). This restatement of the express advocacy test avoids the pitfalls identified in *Buckley* and *Thomas* by ensuring that a communication plausibly subject to "varied understanding[s]" is excluded from the statute's reach.

[7] As an agency of the federal government, the Commission is entitled to a strong "presumption of honesty and integrity." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). *See also Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

[8] *FEC v. CLITRIM*, 616 F.2d 45 (2d Cir. 1980) (en banc); *FEC v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979).

vide no reason for this Court to revisit this issue so soon.[9]

2. Petitioner also challenges the constitutionality of the reporting and disclosure provisions he violated on the basis of the First and Fifth Amendments (Pet. 21-23). Petitioner's First Amendment challenge is frivolous, for this Court upheld the constitutionality of the predecessors of these provisions, as applied to express advocacy, in *Buckley v. Valeo*, 424 U.S. at 80-81, and Congress specifically limited the coverage of the current provisions to express advocacy "to be consistent with the discussion of independent political expenditures which was included in *Buckley v. Valeo*." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 38 (1976).

Petitioner argues that the reporting requirements violate his Fifth Amendment right to equal protection because the institutional press is exempted from

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[9] Petitioner asserts (Pet. 21) that this case discloses "at least four ways to construe [express advocacy]." As this brief demonstrates, the Commission has not disagreed with the court of appeals' application of the statute, and the Commission's briefs below were entirely consistent with the court of appeals' decision. Moreover, until now Petitioner has always insisted that he agreed fully with the district court's decision in this case. That reduces Petitioner's four approaches to two. But even the district court and the court of appeals were not really very far apart in their views of this case: both courts agreed that Mr. Furgatch's advertisements were so near the limit of the statute's coverage that the case was a "very close call" (Pet. App. 8a, *agreeing with* Pet. App. 19a). Thus, the "confusion of views among the professionals of the bench and bar" described by Petitioner (Pet. 21) is in reality only a narrowly differing assessment of the facts of this case.

these provisions by 2 U.S.C. § 431(9)(B)(i).[10] This Court has repeatedly rejected such equal protection arguments, finding that with respect to campaign finance legislation it is appropriate to defer to the "judgment by Congress that . . . entities having differing structures and purposes . . . may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981). *Accord, FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982).[11] In particular, this Court noted in *Buckley* that special protections for the news media, like section 431(9)(B)(i), are "the rule, not the exception."

> Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media . . . and preferential postal rates and antitrust exemptions for newspapers.

424 U.S. at 93 n.127.

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[10] As Petitioner notes (Pet. 7, 23), he is requesting this Court to consider this contention in the first instance, since the court below did not address it beyond observing that this Court had previously upheld the constitutionality of these provisions (Pet. App. 17a). Petitioner's petition for rehearing to that court did not suggest further elaboration on this issue was necessary. *See* Fed. R. App. P. 40(a) ("The petition shall state with particularity the points of law or fact which . . . the court has overlooked . . . .").

[11] *See also Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (summarily rejecting, *inter alia*, equal protection challenge to 2 U.S.C. § 431(9)(B)(i) which was set out in *Athens Lumber Co. v. FEC*, 689 F.2d 1006, 1015-16 (11th Cir. 1983), *appeal dismissed, cert. denied*, 465 U.S. 1092 (1984).

The institutional news media covered by section 431(9)(B)(i) are not, in fact, comparable to an individual purchasing an advertisement for political advocacy. Unlike an individual purchasing an advertisement, when a newspaper publishes an editorial the newspaper's financial sponsorship of the editorial is well understood, so that disclosure of the allocable operating costs is less crucial to the statutory goal of disclosing the constituencies of the candidate. *See Buckley v. Valeo*, 424 U.S. at 81. On the other hand, requiring a newspaper to report the portion of its daily operating costs allocable to editorial comments on federal elections would be far more burdensome than requiring an individual to report a discrete payment of an amount certain to purchase an advertisement.

In any event, to the extent the Act treats Mr. Furgatch differently than the institutional press, the disparity tips decidedly in his favor. Most if not all of the institutional press are corporations which, as the Court noted in *California Medical Ass'n v. FEC*, 453 U.S. at 200-01, are subject to other, more stringent restrictions on their political activities than the reporting requirements of which Mr. Furgatch complains. Indeed, in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 625-26, this Court explained at length how the Act's regulation of corporations is much more burdensome than the reporting requirements in 2 U.S.C. § 434. For example, while Mr. Furgatch is free to purchase advertising expressing his political choices in any newspaper in the country, so long as he reports his expenditures, a corporate newspaper is only permitted to run such an editorial in its own newspaper for distribution to its usual purchasers, and is entirely prohibited by

2 U.S.C. § 441b from expending its money to publicize its electoral views elsewhere. *See FEC v. Massachusets Citizens for Life, Inc.*, 107 S. Ct. at 624.[12] Thus, as in *California Medical Ass'n v. FEC*, 453 U.S. at 200 (emphasis in original), Petitioner's "claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions."

CONCLUSION

The petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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[12] "[T]he First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed . . . ." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 n.14 (1985).

APPENDIX

APPENDIX

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2 U.S.C. § 431. Definitions

When used in this Act:

(9) (A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include—

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

* * *

(17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

* * *

§ 434. Reporting requirements

(c) *Statements by other than political committees; filing; contents; indices of expenditures.*

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with sub-

section (a)(2) of this section, and shall include—

(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Any independent expenditure (including those described in subsection (b)(6)(B)(iii) of ths [sic] section) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) of this section indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

* * *

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—

> (3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

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